Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

BILLIE J. SAUNDERS, individually and as Personal Representative of the Estate of James E. Saunders, Deceased; JAMES E. SAUNDERS, deceased

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ Of Certiorari
To The United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Brian J. Iller
RETTIG OSBORNE FORGETTE
6725 W. Clearwater Avenue
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Question Presented for Review

Whether the Ninth Circuit decision in this Federal Tort Claims Act case is directly and irreconcilably inconsistent with established state law precedent on the public duty doctrine.

Parties to Proceeding

PETITIONERS:

BILLIE J. SAUNDERS, individually and Personal Representative of the Estate of James E. Saunders, Deceased; JAMES E. SAUNDERS, deceased.

RESPONDENT:

UNITED STATES OF AMERICA.

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1. CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

This is a Federal Tort Claims Act (FTCA) case brought pursuant to 28 U.S.C. § 2674. The Ninth Circuit affirmed a summary judgment in favor of the defendant United States by Order dated May 25, 2004. The Ninth Circuit denied a petition for rehearing on July 20, 2004. Rules 13.1 and 13.3 of this Court allow the filing of a Petition for Certiorari within 90 days of the entry of the order denying the petition for rehearing because the United States is a party. This Court has jurisdiction to review on a writ of certiorari the judgment pursuant to 28 U.S.C. 1254 and U.S.Sup. Ct Rule 10(a).

2. STATUTES INVOLVED IN THIS CASE:

28 U.S.C. § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 1346(b)(1):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

8 U.S.C. § 1226:

> (C) Detention of criminal aliens
>
> > (1) Custody
> >
> > The Attorney General shall take into custody any alien who--
> >
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(I) of this title on the basis of an offense for which the alien has been sentence [FN1] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

3. CONCISE STATEMENT OF THE CASE.

a. Facts Material to Consideration of the Questions Presented.

On October 7, 1999, Washington State Patrol Trooper

James Eric Saunders ("Trooper Saunders"), was murdered by a criminal alien, Nicolas Solorio Vasquez ("Vasquez"), during a routine traffic stop. (ER 123) Vasquez was free to murder Trooper Saunders because the Immigration and Naturalization Service ("INS") had failed to take him into custody upon his release from Franklin County Jail, despite its obligation to take criminal aliens into custody under 8 U.S.C. § 1226©), and despite the fact that INS had been faxed notice that Vasquez was being held by Franklin County jail. (ER 124) This case is brought by Trooper Saunders' wife to recover damages suffered due to his death.

Following the death of Trooper Saunders, the Immigration and Naturalization Service ("INS")[1] came under public scrutiny over the fact that Vasquez had not been

1. The Immigration and Naturalization Service ("INS") is an agency of the U.S. Department of Justice and the Border Patrol is a sub-agency of the INS, hereinafter collectively referred to as INS.

detained and deported. (ER 126) It is not disputed that at the time of his arrest, at the time of his release on bail, and at the time of his murder of Trooper Saunders, Vasquez was an illegal alien and aggravated felon subject to detention and deportation pursuant to 8 U.S.C. § 1226(c)(hereinafter the "mandatory detention statute.") In response to the public scrutiny, INS carried out an internal investigation and issued a report with a set of "talking points" for its agents in which INS claimed:

> "During this two week time period, the Pasco (sic) office was not notified that Solorio was in custody. Had the agent assigned to the jail or any of the three other INS officers been aware of his presence in the facility, a hold would have been placed."

(ER 126)

INS initially claimed (falsely as it was later proven):

> "Talking Points
>
> * * *
>
> Is the Union's claim that the detail to Arizona resulted in no hold being

placed valid?

* * *

Agent Holguin indicated that he would have placed an immigration hold on Solorio, had he been aware of his presence.

* * *

Is the reason no immigration hold was placed on Solorio the fault of Franklin County for failing to notify INS?

* * *

It is true that had the INS been notified of Solorio's presence, an immigration hold would have been placed. However, jails in Washington State are under no legal obligation to notify the INS of suspected criminal aliens. Generally, Franklin County and other counties do a very good job notifying INS, but only as a courtesy."

(ER 126)

Discovery in this case demonstrates beyond any dispute that the INS was, in fact, notified that Vasquez was in Franklin County custody, but its agents failed to act on that notification.

INS, contrary to its "talking points," has now admitted that its office did receive a fax from Franklin County Jail notifying INS that Vasquez was in custody. (ER 128) As a matter of policy and procedure, the Franklin County Jail faxes to the Richland INS office the daily booking sheet naming all persons booked into the Franklin County Jail. (ER 127) That booking sheet sets forth the name, place of birth and category of crime for each person in custody. (ER 128) The booking sheet containing the name of Nicolas Solorio Vasquez, his place of birth as Mexico and the charges for which he was arrested, was faxed to the INS office on July 27, 1999. (ER128) Franklin County's fax log evidences that the fax notifying INS that Vasquez was in custody had indeed been sent and received by the INS at 9:21 a.m. on July 27, 1999. (ER128) INS Agent Donald Holguin, who was assigned to the Franklin County Jail at the time, subsequently admitted on deposition that the Richland INS office did, indeed, receive the

fax, and was thereby notified of Vasquez' incarceration. (ER128) Thus, INS had fourteen days within which to place a hold on Vasquez before he was released on bail. (ER128-129) INS admits that the fax contained sufficient information that it should have caused INS to check Vasquez against the INS data bank, which would have led to the discovery that he was an illegal alien and aggravated felon, resulting in the issuance of a hold, a process taking approximately five minutes to complete. (ER 128-129; 131)

In addition to the fax notification of Vasquez' incarceration, INS agents visited the Franklin County Jail on at least six separate occasions between July 26, and August 9, 1999. (ER129) INS had "behind the counter" privileges, which gave them access to all of the records of all persons in custody at the jail at the time of their visit. (ER 129) Inexplicably, INS agents visiting the jail only check the booking sheet for the day of their visit. (ER 130) Thus, if the

INS agents do not check the faxes for the days they do not visit the jail they overlook any alien placed in custody on those days. (ER 130)

To determine why Vasquez was not placed on an INS hold, Saunders deposed the six agents assigned to the Richland office, which had jurisdiction over the Franklin County Jail, and their supervising agent in Spokane. The Richland office had no policy or procedure in place for the recording and distribution of incoming faxes. (ER 130) The agents would simply come by the fax machine and retrieve whatever faxes were of interest to them. (ER130) In addition, one of the agents apparently routinely distributed the faxes to the various agents in the office and believes that he most likely would have picked up the July 27, 1999 fax from Franklin County and placed it on Don Holquin's chair or desk. (ER 130)

Agent Holguin believes the failure to detain Vasquez and take him into custody was an oversight because he was

only in the office for three or four days following receipt of the fax and then left on a 30-day reassignment or leave. (ER 131) Holguin, who had personally deported Vasquez on at least two prior occasions, was unable to give any further explanation as to why Vasquez was not placed on hold. (ER 131) Vasquez was well known to the INS having been deported on five prior occasions; two voluntary and three involuntary. (ER 131) Holguin knew Vasquez by name. (ER 131)

Indeed, Vasquez had previously been deported by INS while awaiting trial on an first degree assault charge. (ER 125) Other agents in the office who carried out Holguin's duties in his absence were unable to explain why they failed to place a hold on Vasquez. (ER131)

Had INS done its duty and placed a "hold" on Vasquez, Trooper Saunders would not have encountered Vasquez on October 7, 1999, and Trooper Saunders would be alive today. Had Vasquez been placed on an INS hold and remained in

custody until trial, it is likely he would have been convicted and sentenced to 28 to 36 months confinement. (ER 133) Conversely, if he had been placed on hold and nevertheless posted cash bail, Vasquez would have been immediately taken into INS custody and deported to Mexico. (ER 133) If Vasquez would have been found not guilty, he would have been deported immediately after trial. Further, if Vasquez had been deported before trial, the felony charges for trafficking in narcotics would have remained for the indefinite future, making it unlikely that he would have returned to the State of Washington following his deportation because he would be subject to rearrest and trial. (ER 133)

B. Basis for Federal Court Jurisdiction in the Court of First Instance.

This is a Federal Tort Claims Act case brought pursuant to 28 U.S.C. § 2674. The District Court for the Eastern District of Washington had jurisdiction pursuant to 28

U.S.C.A.§1346.

4. ARGUMENT FOR ALLOWANCE OF WRIT.

The Writ should be granted because the Ninth Circuit's interpretation of the Washington state "public duty doctrine" directly and irreconcilably conflicts with the decisions of the Washington Courts which establish the state law that the Ninth Circuit is obligated to follow in this FTCA action. In ignoring that Washington case law, and holding the action is barred as a matter of law, the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup Ct. Rule 10(a).

In Federal Tort Claims Act (FTCA) actions, the liability of the United States is governed by the law of the state in which the alleged acts or omissions occurred. 28 U.S.C. § 1346 (b).

The Ninth Circuit affirmed the dismissal of Trooper Saunders' claim based on its application of the "public duty doctrine" established by Washington case law. In doing so, it rejected Saunders' argument that two exceptions to the doctrine applied: (1) The "legislative intent exception;" and (2) the "failure to enforce exception."

In rejecting application of those exceptions, the Ninth Circuit's reasoned:

> However, Saunders' proposed class must logically be "potential victims of criminal aliens" because there is no way, ex ante, to predict who in the United States will be a victim of a crime by a criminal alien."[footnote 2]

---

[2] As Saunders' proposed class can only be potential victims of criminal aliens, her reliance on *Yonker v. State Dep't. Of Soc. & Health Serv.*, 930 P.2d 958 (Wash.Ct.App. 1997) and *Donaldson v. City of Seattle*, 831 P.2d 1098 (Wash.Ct.App. 1992)–both of which involved actual victims who had already been brought to law enforcement's attention–is unavailing.

> Because any member of the public at large, without further narrowing, is theoretically a "potential" victim of criminal aliens, Saunders' argument is nothing more than an assertion that criminal aliens are a threat to "public safety." A threat to the public at large creates a duty owed to all, not individually to Saunders, and thus Saunders cannot take advantage of either exception to the public duty doctrine.

This interpretation is impossible to reconcile with precedent established by Washington appellate cases applying the exceptions to the public duty doctrine. First, the Washington Supreme Court has held that a municipality may be liable to the victims of drunk drivers, a class equally as large as the victims of criminal aliens. *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987). There, the Washington Supreme Court held that the Town of Forks' failure to arrest an obviously intoxicated driver was actionable under the "failure to enforce" exception. The court held that Washington statutes mandating "protective custody" of intoxicated persons created a sufficiently specific tort duty to

allow victims of drunk drivers to recover against the Town. Nothing in the *Bailey* case indicates that the police officer (or any other law enforcement officer) had any prior contact with or knowledge of the plaintiff, who was a passenger on a motorcycle which was later hit by the drunk driver. Indeed, the *Bailey* court expressly held that no such contact was necessary:

> Facts alleged by Ms. Bailey satisfy all three requirements of the failure to enforce exception. First, the Forks police officer was a governmental agent with a duty to enforce statutory requirements. State statutes prohibit and establish criminal sanctions for driving or being in physical control of a motor vehicle while under the influence of alcohol. RCW 46.61.515. Moreover, under RCW 70.96A.120(2) [FN1], a police officer has a statutory duty to take into custody a publicly intoxicated individual. Second, Ms. Bailey alleged that the police officer took no corrective action and possessed actual knowledge of statutory violations. According to Ms. Bailey, the officer allowed Medley to take the wheel of the pickup truck and drive away even though Medley's intoxicated state was apparent to the officer.

FN1. "... a person who appears to be incapacitated by alcohol and who is in a public place or who has threatened, attempted, or inflicted physical harm on another, shall be taken into protective custody by the police or the emergency service patrol ..." RCW 70.96A.120(2).

Finally Ms. Bailey, riding as a passenger on a motorcycle, came within the class RCW 70.96A.120(2) and RCW 46.61.515 were intended to protect. This court and the Legislature have recognized the important public policy interests inherent in the effective removal of drunken drivers from the roads and the concomitant problem of deciding who should bear the costs for injuries and deaths caused to innocent motorists. [Citations Omitted] Undoubtedly the Legislature enacted RCW 46.61.515 in its entirety, and RCW 70.96A.120(2) in part, to protect the users of public highways from accidents caused by intoxicated drivers. When Ms. Bailey sustained her injuries she was undoubtedly a member of the class to be protected. When a governmental agent knows of the violation, a duty of care runs to all persons within the protected class, not merely those who have had direct contact with the

> governmental entity. For example, in *Campbell v. Bellevue*, 85 Wash.2d 1, 530 P.2d 234 (1975), a city electrical inspector knew of the extreme danger created by a nonconforming underwater lighting system, which later electrocuted the plaintiff's wife. Even though the plaintiff had personally complained of the dangerous condition, we held that a duty of due care existed with reference to "those persons or class of persons residing within the ambit of the danger involved." *Campbell*, at 13, 530 P.2d 234. Like an electrical inspector who leaves a live electric wire unattended, a police officer who allows an obviously drunk driver to continue on his or her way sets loose an "inherently dangerous instrumentality".

(Underlining added.)

The Washington Court of Appeals cases the Ninth Circuit distinguished are equally favorable to Saunders. In *Yonker*, 930 P.2d 958, at pp. 962-63, the court held that "children and dependents who may be abused or neglected" by child abusers constitute a sufficiently particular and circumscribed class, rejecting an argument that such a class is too broad to satisfy the exception to the public duty doctrine.

In doing so, the *Yonker* court relied on *Donaldson*, 831 P.2d 1098, also distinguished by the Ninth Circuit, as follows:

> The requirement is not that the class be small or narrow, but that it be "particular and circumscribed." *Donaldson*, 65 Wn.App. At 667, 831 P.2d 1098. "Particular" means "involving, affecting, or belonging to a part rather than the whole of something: . . . not universal." Websters Third New International Dictionary 1647 (3d Ed. 1976). "Circumscribe" means "to set limits or bounds to: . . . to define, mark off or demarcate carefully." Webster's Third new international Dictionary 410 (3d Ed. 1976). Neither of these qualifiers necessarily means that the protected group must be small or narrow. Indeed, such is not the requirement. For example, the class of persons protected in *Donaldson*, victims of domestic violence, unfortunately cannot be described as small. It is, however, particular and circumscribed, as is the class sought to be protected here.

Yonker, 930 P.2d 958, at pp. 962-63 (Underlining added.)

Accordingly, it is clear under Washington law that "victims of a particular class of criminal" is sufficiently particular and circumscribed to satisfy the exceptions to the

public duty doctrine. Washington law recognizes that victims of drunk drivers have a cause of action against the authorities that failed to arrest the drunk drivers. Washington law recognizes that victims of child abusers have a cause of action against the authorities that failed to arrest the child abusers. Washington law recognizes that victims of domestic violence have a cause of action against the authorities that failed to arrest the spouse beater. These classes are no less particular and circumscribed than the class of victims of criminal aliens. Accordingly, the Ninth Circuit violated the statutory requirement that it apply the law of the state in which the case arose.

5. Conclusion.

The Ninth Circuits decision cannot be reconciled with these Washington decisions. The Ninth Circuit's reasoning is directly contrary to the Washington Court's reasoning. This Court should grant the writ to enforce the statute that

mandates that liability in FTCA claims are governed by the state law of the state in which the claim arose.

Dated this 18th day of October, 2004

Rettig, Osborne, Forgette

_____

By: Brian J. Iller

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLIE J. SAUNDERS, individual and as Personal Representative of the Estate of James E. Saunders, deceased; JAMES E. SAUNDERS, deceased,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 03-35157

D.C. No. CV-01-05099-RHW
Eastern District of Washington, Spokane

ORDER

Before: HUG, TASHIMA, and PAEZ, Circuit Judges.

Plaintiffs – Appellants' Petition for Rehearing by the panel pursuant to Federal Rule of Appellate Procedure 40(a) is denied.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 03-35157
CT/AG#: CV-01-05099-RHW

BILLIE J. SAUNDERS, individual and as Personal Representative of the Estate of James E. Saunders, deceased; JAMES E. SAUNDERS, deceased

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane) .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 25, 2004.

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MAY 25 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLIE J. SAUNDERS, individual and as Personal Representative of the Estate of James E. Saunders, deceased; JAMES E. SAUNDERS, deceased, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant - Appellee.	No. 03-35157 D.C. No. CV-01-05099-RHW MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted May 6, 2004
Seattle, Washington

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HUG, TASHIMA, and PAEZ, Circuit Judges.

Billie Saunders, the widow of Washington State trooper James E. Saunders, appeals the district court's summary judgment ruling in favor of the United States dismissing her wrongful death action brought pursuant to the Federal Tort Claims Act ("FTCA"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

We review *de novo* the district court's summary judgment ruling. *See United States v. City of Tacoma, Wash.*, 332 F.3d 574, 578 (9th Cir. 2003). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). Summary judgment may be affirmed on any ground supported by the record. *See Solomon v. Interior Reg'l Housing Auth.*, 313 F.3d 1194, 1196 (9th Cir. 2002). As to tort claims under the FTCA, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The determination of liability is based on the law of the sate where the alleged acts or omissions occurred.

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[1]Because the parties are familiar with the background facts, we do not recite them in detail.

28 U.S.C. § 1346(b). Therefore, Washington law controls here.

I.

The district court correctly granted summary judgment to the United States on Saunders' wrongful death claim.

Assuming, without deciding, that 8 U.S.C. § 1226(c) imposed a mandatory duty on the Border Patrol to place an immigration hold on Nicolas Solorio Vasquez, Saunders' claim nonetheless fails because she cannot show that the claim fits within any exception to the public duty doctrine.

The public duty doctrine provides "that for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one)." *Bailey v. Town of Forks*, 737 P.2d 1257, 1259 (Wash. 1987) (en banc)(citation omitted).

Saunders attempts to rely on two exceptions to the public duty doctrine. First, Saunders argues that the "legislative intent" exception is applicable. Under this exception, the public duty doctrine does not apply "when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons." *Id.* at 1260. Second, Saunders asserts that the failure to enforce

exception applies. Under this exception, "where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect" the public duty doctrine is not a bar to recovery. *Id.*

Saunders does not qualify for either exception because there is no evidence that 8 U.S.C. § 1226(c) was intended to protect anything other than the public at large. Indeed, the relevant legislative history supports this conclusion. *See, e.g.*, S. Rep. No. 104-48, at 1 (1995) ("Criminal aliens are a serious and growing threat to public safety . . .").

Under both exceptions, Saunders must identify either a "particular and circumscribed class" (the legislative intent exception), or a "class the statute intended to protect" (the failure to enforce exception) that is narrower than the public at large. Saunders asserts that § 1226(c) was designed to protect "victims of criminal aliens." However, Saunders' proposed class must logically be "potential victims of criminal aliens" because there is no way, *ex ante*, to predict who in the United

States will be a victim of a crime by a criminal alien.[2] Because any member of the public at large, without further narrowing, is theoretically a "potential" victim of criminal aliens, Saunders' argument is nothing more than an assertion that criminal aliens are a threat to "public safety." A threat to the public at large creates a duty owed to all, not individually to Saunders, and thus Saunders cannot take advantage of either exception to the public duty doctrine.

II.

As the public duty doctrine bar is sufficient to uphold the district court's summary judgment ruling in favor of the United States, we do not address the district court's alternative rulings that Saunders could not show proximate cause as a matter of law, or that the discretionary exception to the FTCA does not apply in this instance.

AFFIRMED.

2

As Saunders' proposed class can only be potential victims of criminal aliens, her reliance on *Yonker v. State Dep't. of Soc. & Health Serv.*, 930 P.2d 958 (Wash. Ct. App. 1997) and *Donaldson v. City of Seattle*, 831 P.2d 1098 (Wash. Ct App. 1992)–both of which involved actual victims who had already been brought to law enforcement's attention–is unavailing.

(2) Supreme Court, U.S.
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UNITED STATES OF AMERICA

Respondent

On Petition for Writ Of Certiorari
To The United States Court of Appeals

SUPPLEMENTAL APPENDIX

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FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington

JAN 21 2003

JAMES R. LARSEN, CLERK DEPUTY
SPOKANE, WASHINGTON

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BILLIE SAUNDERS, et al. Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	No.CV-01-05099-RHW ORDER GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment brought by the parties. Plaintiff brings summary judgment on the issue of liability, seeking to find (a) that the

Government was negligent as a matter of law, and (b) that as a matter of law, the Government's negligence was the proximate cause of the death of the decedent (Ct. Rec. 12). The Government also moves for summary judgment on the issue of liability, seeking to find that the Government was not liable for the death of Mr. Saunders as a matter of law (Ct. Rec. 17).

BACKGROUND

To a large extent, the facts in this case are undisputed. This case involves a wrongful death action brought by the widow of James E. Saunders against the United States. On October 7, 1999, Nicolas Solorio Vasquez ("Vasquez") murdered Washington State Trooper James E. Saunders during a routine traffic stop. At the time of the murder, Vasquez was free on bail, awaiting trial on charges of drug trafficking. Vasquez was arrested on those charges on July 26, 1999, and was booked into the Franklin County Jail on that date. At the time of his arrest, Vasquez was an illegal alien and aggravated felon. Nevertheless, the Immigration and Naturalization Service ("INS") never placed an INS hold on Vasquez during his detention at the jail.

The INS agents were notified that Vasquez was in custody at the Franklin County Jail. On July 27, 1999, the jail faxed a daily booking sheet to the Richland, Washington INS office that named all persons that had been placed in custody of the jail in the previous 24 hours. Vasquez's name, along with the charges for which he had been arrested, appeared on that fax. In addition to being notified of Vasquez's incarceration, the INS agents visited the jail on six separate occasions between July 26, 1999, and August 9, 1999. Had the INS placed a hold on Vasquez, he would not have been able to obtain a bail bond. Even if Vasquez had been able to obtain a bond, imposition of an INS hold would have resulted in Vasquez being turned over to the INS for deportation upon his release on bail.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment,

a court may neither weigh the evidence nor assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

"When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

B. Plaintiff's Liability Claims

Plaintiff brings this action under the Federal Tort Claims Act ("FTCA"). The FTCA is a waiver of sovereign immunity with respect to claims based on injuries caused by the negligent or wrongful acts of federal employees acting within the scope of employment. *See Laird v. Nelms*, 406 U.S. 797, 799 (1972). As to tort claims under the Act, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances."

28 U.S.C. § 2674. The determination of liability is based on the law of the state where the alleged acts or omissions occurred. 28 U.S.C. § 1346(b). Washington tort law is, therefore, controlling.

To establish negligence under Washington law, a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *See Mucsi v. Graoch Assoc. Ltd. Partnership No. 12*, 144 Wash. 2d 847 (2001). Plaintiff moves for summary judgment on all four of these elements.

1. Existence of a duty

The parties vigorously dispute whether, as a matter of law, the United States owed Trooper Saunders a duty of care. Under Washington law, "[a] breach of a duty imposed by statute . . . shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence." RCW 5.40.050.

Any duty that arises in this case gets its genesis from 8 U.S.C. 1226(c). That statute states, in pertinent part:

> The Attorney General ***shall take into custody*** any alien who--
>
> > (A) is inadmissible by reason of having committed any offense covered in section

> 1182(a)(2) of this title,
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
> ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c) (emphasis added). There is no dispute that Vasquez met the substantive requirements of the statute because he had two prior felony cocaine convictions in 1996, thus qualifying him as a alien subject to the act under subpart (B).

Consequently, Plaintiff maintains that under 8 U.S.C. § 1226(c), the United States had a mandatory duty to detain

Vasquez when he was released on bail.[1] Defendant forwards two arguments as to why the statute did not impose a duty on the Government. First, the Government argues that regardless of the fact that Vasquez was an "alien" as defined in the statute, the statute contains a temporal requirement that triggers the duty to detain only when an alien has been released from a sentence. Since Vasquez was released on bail prior to serving any sentence for the crime with which he was charged, the United States claims it had no duty to detain Vasquez. This argument focuses on the meaning of the term "released" as employed in the statute. Second, the United States contends that even if it had the responsibility to detain Vasquez, the Government did not owe a duty to Trooper Saunders under the public duty doctrine articulated under Washington tort law.

(a) ***Is a release on bond a "release" as contemplated under the terms of 8 U.S.C. § 1226?***

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[1] The plain meaning of the term "shall" in a statute is that the action required is mandatory. *See Kenneth W. Brooks Trust v. Pacific Media LLC*, 111 Wash. App. 393, 398-99 (2002).

As noted, the Government maintains that the statute requires a conviction on the crime for which a criminal alien is being held before the detention requirement takes effect. The Government asserts that the plain language of the statute supports this interpretation, as does the reasoning of a limited number of courts that have addressed the meaning of "release" under the statute.

Contrary to the Government's contention, however, the plain language of the statute does not support the reading the Government advances. The statute says the detention requirement is prompted "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c). Thus, the statute communicates quite clearly that detention should occur "when the alien is released," without more. The list of various types of release that follow are not qualifiers as to what constitutes a "release" under the statute, but rather are an expression that detention should occur no matter the type of release at issue.

There is no indication that these types of "releases" are the only "releases" that warrant detention under the statute, *i.e.*, the statute is not phrased in exclusive language.

Moreover, the amendments made by Congress to the statute in 1991 demonstrate that the statute does not support the reading the Government urges. Prior to 1991, the statute read:

> The Attorney General shall take into custody any alien who. . .[commits any of the numerous criminal acts specified] . . . ***upon completion of the alien's sentence***.

See P.L. 102-232 (emphasis added). Thus, prior to 1991, the statute read such that it supported the Government's position. Yet, Congress specifically struck the emphasized language with the amendment of the act in 1991. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386 (1995). It is now clear that under the plain language of the statute, Congress intended the Government to detain aliens upon their release, whenever that occurs, and regardless of whether that occurs before or after completion of a particular alien's sentence.

The case law cited by the Government likewise does not sustain its claim. The Government cites three cases that it maintains supports its position that the statute only requires detention after completion of an alien's sentence: *Cuomo v. Barr*, 812 F. Supp. 324 (N.D.N.Y. 1993), *Lepez-Mejia v. United States Immigration and Naturalization Service*, 798 F.2d 625 (C.D. Cal. 1992), and *Hoang v. Comfort*, 282 F.3d 1247 (2002).

In *Cuomo*, the court merely held that a specially created "conditional parole for deportation only" program instituted by the State of New York did not constitute a release pursuant to parole as contemplated by the statute because the program only effectuated a transfer of custody. Nowhere in the opinion does the court state, or even imply, that a "release" under the statute only occurs after completion of an alien's sentence. *See Cuomo* 812 F. Supp. at 328. *Lepez-Mejia* is inapplicable because the court there was interpreting the pre-1991 version of the statute. Lastly, the court in *Hoang* simply stated in passing that "under [§ 1226(c)], the Attorney General is directed to detain 'deportable' criminal aliens following release from their original sentences prior to decisions on their removal from

the United States." 282 F. 3d at 1252. While this statement is perfectly accurate, it certainly does not establish that, as a matter of law, the statute's detention obligations are *only* triggered upon completion of an alien's sentence.

Thus, none of the Government's arguments concerning the language of the statute are persuasive. As a result, it appears that the plain language of 8 U.S.C. § 1226(c) imposed a mandatory duty on the United States to detain Vasquez upon his release from the Franklin County Jail on bail.

(b) Does Washington's public duty doctrine defeat the basis of any duty owed by the United States to Trooper Saunders?

Washington recognizes a tort rule called the public duty doctrine. *See Taylor v. Stevens Cy.*, 111 Wash. 2d 159, 163. Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the inured person as an individual and was not merely the breach of an obligation owed to the public in general. *See J.B. Dev. Co. v. King Cy.*, 100 Wash. 2d 299, 303 (1983).

The doctrine is not favored in Washington. The Washington Supreme Court has noted that "[w]e have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit" and that "injured plaintiffs suffer harshly under the doctrine." *See Bailey v. Town of Forks*, 108 Wash. 2d 262, 267 (1987). As a result, Washington has carved out four exceptions to the public duty doctrine. These exceptions include: (1) when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent); (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce); (3) when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff (rescue doctrine); or (4) where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances

inherent in a duty vested in a governmental entity (special relationship). *Id* at 267-68.

The Government addresses only the applicability of the first exception—legislative intent to protect a specific class—in its moving papers, and contends that the exception does not apply because the purpose of the detention statute is only to protect society at large. Plaintiff claims that (a) Trooper Saunders was, indeed, within a specific class of individuals intended to be protected by the mandatory detention statute; and (2) the failure to enforce exception applies to the United States.

(i) The legislative intent exception

Federal courts have indicated that 8 U.S.C. § 1226 promotes the dual interests of ensuring that criminal aliens will appear at pending immigration proceedings and protecting society from the dangerous propensities of criminal aliens. *See Nguyen v. Fasano*, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000); *cf. Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). The Ninth Circuit has echoed these determinations, finding that the purpose of 8 U.S.C. § 1226 is

to "protect society." *See Alvarez-Mendez v. Stock*, 941 F.2d 956 (9th Cir. 1991). There is no indication that the statute is intended to protect some particular class of society.

Plaintiff argues that the legislative history of the statute reveals that one of the primary purposes of the mandatory detention provision was to reduce the burdens on law enforcement created by the release of criminal aliens into the population. Even if this is true (and the legislative history does appear to support the claim), the intent of the statute still was not to "protect" law enforcement officials, rather only to lessen their work loads.[2] The "legislative intent" exception does not apply.

(ii) The failure to enforce exception

The failure to enforce exception requires a plaintiff to satisfy three factors: (1) governmental agents responsible for enforcing statutory requirements must have actual knowledge of a statutory violation; (2) the agents must fail to take corrective action; and (3) the plaintiff must be within the

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[2] Plaintiff maintains that the present case is indistinguishable from *Bailey v. Town of Forks*, 108 Wash. 2d 262 (1987). Yet, in *Bailey*, unlike here, the court was able to define a specific class of persons the statute at issue was meant to protect—users of public highways. As noted above, Plaintiff is not able to identify any particular class besides "society" in general, which does not suffice.

class the statute was designed to protect. *See Coffel v. Clallam Cy.*, 58 Wash. App. 517, 523 (1990). All that is required to show "actual knowledge" is knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself. *Id.* As long as the trier of fact can determine that the defendant had knowledge of the facts constituting statutory violations, that is enough to show actual knowledge. *Id.* Also, circumstantial evidence may support a finding of actual knowledge. *See Waite v. Whatcom Cy.*, 54 Wash. App. 682 (1989). Constructive knowledge, however, is insufficient under the failure to enforce exception.[3] *See Moore v. Wayman*, 85 Wash. App. 710, 724 (1997).

Here, there is no dispute that the INS received the faxed notice from the Franklin County Jail and that the notice contained Vasquez's criminal record and his country of origin. The faxed booking sheet, however, apparently did not

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[3] Under Washington law, constructive knowledge is defined as "information which would lead a reasonable man in the same situation to believe that [the relevant] facts exist." *See State v. Kees*, 48 Wash. App. 76 (1987)

disclose whether Vasquez had previously been deported or removed. The INS databases would have divulged this information had Vasquez's name been searched.

The Government, thus, maintains that it did not have actual knowledge because it would have been required to conduct further investigation to determine whether Vasquez must be detained and deported. In support of its argument, Defendant notes that Washington does not recognize a duty to investigate and, thus, it maintains that the United States did not owe a specific duty to Trooper Saunders to investigate the criminal status of Vasquez. *See Corbally v. Kennewick School Dist.*, 94 Wash. App. 736, 740 (1999) (claim for negligent investigation is not cognizable under Washington law); *cf. Rodriguez v. Perez*, 99 Wash. App. 439, 443 (2000) (duty of police officers to investigate crimes is duty owed to public at large and is, therefore, not a proper basis for individual's negligence claim).

Construing the evidence most favorably to the nonmoving party, a rational trier of fact could reasonably infer actual knowledge to the INS. The INS had all the facts it needed via the fax and its own data banks to possess actual knowledge that Vasquez was subject to detention under

8 U.S.C. § 1226. The duty to investigate does not have any bearing on this conclusion in that Plaintiff is not trying to impose such a separate duty on Defendant. Moreover, whether the INS chose to investigate Vasquez's status is irrelevant under the "failure to enforce" exception in that the INS database did, indeed, contain facts that, when coupled with those facts included in the fax sent from the Franklin County Jail, showed Vasquez was subject to detention under the statute. Knowledge of information contained in the INS's own database should be imputed to the Government under the actual knowledge requirement.

Having found that the INS did, indeed, have actual notice, the Court must still address another issue. While the record clearly indicates that the INS failed to take corrective action (thus satisfying prong two of the "failure to enforce" exception), the issue of whether "the plaintiff . . .[is] within the class the statute was designed to protect" presents a more difficult question. The problem is determining whether the "protected class" requirement of the "failure to enforce" exception requires that the "class," as defined in the relevant statute, be "a particular and circumscribed" class, or something to that effect, in order for the exception to apply.

There is no clear answer in the case law, as this appears to constitute a question of first impression in Washington.

Nonetheless, the case law that exists suggests that in order for the "failure to enforce" exception to apply, the relevant statute must, indeed, identify a specific class of people it intends to protect that is more particularized than "the general public." Washington courts narrowly construe the failure to enforce exception. *See Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash. 2d 506, 531, 799 P.2d 250 (1990). The public duty doctrine is employed to determine if the alleged "duty is one owed to a nebulous public or whether that duty is owed to a particular individual." *Honcoop v. State*, 111 Wash. 2d 182, 188 (1988). As noted, 8 U.S.C. § 1226 is not intended to protect a particular class but, rather, is intended to protect a general class—society as a whole. To hold that the "failure to enforce" exception applies to a statute that identifies the public at large as the class it intends to protect would effectively eviscerate the policy considerations identified as supporting the public duty doctrine. *Cf. Taylor*, 111 Wash. 2d. at 168. In this regard, the exception would envelop the rule, which is clearly an improper result. Thus, because such

a general class definition does not suffice under the failure to enforce exception, that exception is inapplicable here. As such, the public duty doctrine applies to this case and defeats any duty owed by the Government to the decedent.

2. Breach of the Duty

Plaintiff maintains that the United States had a mandatory duty to detain Vasquez, and because it failed to do so, it breached its duty.[4] *See* footnote 1, *supra*. The Government claims that it is not liable because the decisions surrounding Vasquez's detention were discretionary and, thus, it is immune from liability under the FTCA.

Summary judgment is appropriate for breaches of duty based on statutory violations unless the violator provides a justification or excuse for the violation. *See Pudmaroff v. Allen*, 138 Wash. 2d 55 (1999). The Government does not offer any such excuse. Rather, the

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[4] Given the novel nature of the duty question at issue in this case, the Court addresses the issues of breach and proximate cause despite finding that the Government did not owe a duty to Trooper Saunders so that those issues are resolved should this case come back to this Court on remand from an appellate court.

Government maintains that its failure to act is excused because its actions were discretionary and, thus, fell under the discretionary function exception of the FTCA.

The discretionary function exception excludes any claim "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In determining whether an act or omission falls within the discretionary function exception, courts follow a two-part test. First, the court must determine whether the conduct at issue was a matter of choice for the acting employee. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, the court must consider whether the agent's or agency's decision is of the type that the discretionary exception was designed to protect.[5] *Id.*

A statute with mandatory language negates the discretionary function exception when it contains "specific and mandatory" wording that "creates clear duties incumbent upon the governmental actors." *See Kennewick Irrigation*

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[5] The parties contest only the first prong of this test, so the applicability of the second prong of the test is not discussed by the Court.

Dist. v. United States, 880 F.2d 1018, 1026 (9th Cir. 1989). Nothing in 8 U.S.C. § 1226 suggests that the duty to detain aliens is at all discretionary. Courts have uniformly found that the obligation to detain is mandatory. *See, e.g., Patel v. Zemski*, 275 F.3d 299, 305 (3rd Cir. 2001); *Badio v. United States*, 172 F. Supp. 2d 1200, 1202 (D. Minn. 2001). Moreover, it appears from the deposition testimony submitted in support of Plaintiff's summary judgment motion that the INS agents in the field in Franklin County understood that their duty to detain was mandatory.

Defendant argues that because the INS in Franklin County has limited resources, the INS agents regularly had to make choices as to whom to investigate and detain. Defendant thus claims that the discretionary function exception is applicable because the detention statute does not tell the INS agents how to detain aliens. This argument misstates the issue, however. The issue is not whether the INS has discretion in the methods it uses to detain, but rather whether the INS has discretion to detain in the first place. Simply because the INS may have chosen as a matter of practice to pursue only certain individuals does not relieve it from its duties under the statute. The United States had a

mandatory duty to detain Vasquez, and because it admittedly failed to do so, it breached its duty as a matter of law.

3. Proximate Cause

Under Washington law, proximate cause consists of two elements: (1) cause in fact; and (2) legal causation.[6] *See McCoy v. American Suzuki Motor Corp.*, 136 Wash. 2d 350 (1998). Under this analysis, the defendant's actions are the cause, in fact, of plaintiff's injuries if the defendant's wrongdoing produced the injuries complained of and any intervening cause was reasonably foreseeable. *See Maltman v. Sauer*, 84 Wash. 2d 975, 982 (1975). Whether an independent cause is reasonably foreseeable is generally a question of fact for the jury. *See id.* Legal cause is decided by the court and is concerned with how far the defendant's liability should extend. *See Hartley v. State*, 103 Wash. 2d 768 (1985).

Plaintiff argues that, as a matter of law, she is entitled to summary judgment on the issue of proximate cause because a reasonable trier of fact can only reach but one

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[6] The parties do not dispute that if the United States did, indeed, owe a duty toward Trooper Saunders, and if the United States breached that duty, the murder of Trooper Saunders constitutes a "resulting injury" as required to prove a cause of action for negligence.

conclusion—that the INS's failure to detain Vasquez was the proximate cause of Trooper Saunders's untimely death. The Government asserts that it is entitled to summary judgment on the proximate cause issue because the incident leading to Trooper Saunders's death was not within the "general field of danger" that Defendant reasonably should have anticipated and, thus, his death was not foreseeable as a matter of law. More specifically, the Government maintains that Vasquez's act of murdering Trooper Saunders constituted an intervening and unforeseeable act.

The Washington Supreme Court has held that intervening criminal acts may be found to be foreseeable. *See McLeod v. Grant City School Dist.* 128, 42 Wash. 2d 316 (1953). In this instance, the question of foreseeability is whether the actual harm at issue fell within a general field of danger that should have been anticipated by the Defendant. *Id.* Thus, it is not the unusualness of the act that results in injury to the plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of hazards covered by the duty imposed upon the defendant. *See Rikstad v. Holmberg*, 76 Wash. 2d 265 (1969).

Plaintiff argues that because Vasquez was an aggravated felon that Congress had mandated be kept in custody for the purpose of protecting society, Trooper Saunders's murder fell into the "general ambit" of hazards that the United States should have anticipated when it released Vasquez. The United States argues the exact opposite, that it did not have adequate notice of Vasquez's propensity for violence and that there was no indication that failing to investigate his status would lead to such violent and tragic consequences.

The Court may determine that a criminal act is unforeseeable as a matter of law if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability. *McLeod*, 42 Wash. 2d at 321-23. While it is generally foreseeable that criminals may commit crimes and that aggravated felons may engage in criminal activity while released on bond, that level of foreseeability does not make the criminal's acts the legal responsibility of everyone who may have contributed in some way to the criminal opportunity. Even assuming that the INS's failure to place a hold on Vasquez was a cause-in-fact of Trooper Saunder's death, the murder did not constitute an injury of the general

character that might reasonably have been anticipated by the Government. This is particularly true considering that Vasquez's prior conviction—which formed the basis of his classification as an "aggravated felon"—did not involve the commission of a violent crime, but rather the nonviolent crime of drug trafficking. The events were so improbable as to fall outside the general field of danger that could have been anticipated by the Government. As such, Vasquez's act constitutes a superseding act that precludes the imposition of liability on the Government as a matter of law.

Thus, in sum, Plaintiff has failed to show that the Government owed the decedent a duty of care. Moreover, even if a duty was owed (in which case the Government breached its duty), as a matter of law, that breach was not the proximate cause of Trooper Saunder's death. Accordingly, **IT IS HEREBY ORDERED:**

1. The Motion by Plaintiffs Billie J. Saunders and James E. Saunders for Partial Summary Judgment on Liability (Ct. Rec. 12) is **DENIED**; and

2. The Motion by Defendant United States for Summary Judgment is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 21st day of January, 2003.

/s/
ROBERT H. WHALEY
United States District Judge

(3)

Supreme Court, U.S.
FILED
MAY 9 - 2005
OFFICE OF THE CLERK

No. 04-969

In the Supreme Court of the United States

BILLIE J. SAUNDERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE TO THE ESTATE OF JAMES E. SAUNDERS, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied state law in holding that the United States could not be held liable under the Federal Torts Claims Act, 28 U.S.C. 2674, 1346(b), for the alleged failure of the United States Border Patrol to place a mandatory "hold" on an illegal immigrant in state custody so as to bar the release of that immigrant who thereafter murdered plaintiff's decedent.

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PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is not published in the Federal Reporter, but is reprinted in 99 Fed. Appx. 814. The opinion and order of the district court (Supp. Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2004. A petition for rehearing was denied on July 20, 2004 (Pet. App. (Order)). The petition for a writ of certiorari was filed October 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Congress vested the federal district courts with exclusive jurisdiction to hear those tort claims, *ibid.*, and provided that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The FTCA contains several exceptions to this limited waiver of sovereign immunity. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1).

b. Under 8 U.S.C. 1226(c), the "Attorney General shall take into custody" any alien who is removable from this country because he has been convicted of one of a specified set of crimes, once that alien is released from prison.

2. On October 7, 1999, James Saunders was murdered by Nicolas Vasquez, an alien who had recently been released from county jail in Washington State. At the time of his release, Vasquez was subject to detention under 8 U.S.C. 1226(c). Before Vazquez was released from Washington state custody, the Immigration and Naturalization Service (INS) was advised that Vasquez was in state custody. The INS did not take Vasquez into custody upon his release from state custody or place a hold on Vasquez's release so that he could be transferred to INS custody. Supp. Pet. App. 2-3.

3. Petitioner filed an FTCA action in the District Court for the Eastern District of Washington, alleging that Sec-

tion 1226(c) imposed a mandatory duty on the United States to take Vasquez into INS custody upon his release from state custody and that the breach of that duty led to Saunders' death. Supp. Pet. App. 6-7.

The district court granted the government's motion for summary judgment. The court held that the United States did not owe an enforceable duty to Saunders under Washington State's "public duty doctrine." Supp. Pet. App. 11. Under that doctrine, the court explained, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed specifically to the injured person and not merely "to the public in general." *Ibid.* Determining that 8 U.S.C. 1226(c) is intended to protect "society as a whole" and not a particular class of individuals, the district court concluded that the United States could not be held liable for failing to enforce that law. Supp. Pet. App. 18.

The district court further concluded that, even if Section 1226 does impose an actionable duty against the government, any breach of that duty was not the proximate cause of Saunder's death, because Vasquez's murder of Saunders was entirely unforeseeable. Supp. Pet. App. 25.

4. The court of appeals affirmed. (Pet. App. (Memorandum)). Assuming without deciding that 8 U.S.C. 1226(c) imposes a mandatory duty on the INS to place an immigration hold on an illegal alien in state custody, the court held that petitioner's claim nevertheless failed under the state-law public duty doctrine. Pet. App. (Memorandum) 3. The court explained that Section 1226(c) was intended not to protect a particular class of individuals, but rather to protect all potential victims of crime—that is, the public at large. *Id.* at 4. Having concluded that INS had not breached an actionable duty, the court of appeals found it

unnecessary to address the district court's holding that petitioner had failed to show proximate causation. *Id.* at 5.

ARGUMENT

1. a. Petitioner contends that this Court should grant certiorari "because the Ninth Circuit's interpretation of the Washington state public duty doctrine directly and irreconcilably conflicts with the decisions of the Washington Courts." Pet. 13. That state law question about the scope of the public duty doctrine, however, does not warrant this Court's review. Cf. *McMillian* v. *Monroe County*, 520 U.S. 781, 786 (1997) (stating that this Court "defers considerably" to court of appeals' "expertise" in interpreting the law of a State within its jurisdiction). Petitioner has pointed to no issue of federal law upon which the lower courts are divided.

In any event, the Ninth Circuit's decision is based on a correct reading of Washington law and does not conflict with the state court decisions on which petitioner relies. The Ninth Circuit correctly held that the exceptions to the public duty doctrine under Washington law apply only if, *inter alia*, the statute creating the duty is intended to "protect a particular and circumscribed class of persons," *Bailey* v. *Town of Forks*, 737 P.2d 1257, 1260 (Wash. 1987), amended, 753 P.2d 523 (Wash. 1988), or government agents knowingly fail to enforce a statute imposing a duty on them to act and the plaintiff falls "within the class the statute [is] intended to protect," *ibid.* Under both exceptions, as the Ninth Circuit explained, the plaintiff must identify a protected class "that is narrower than the public at large." Pet. App. (Memorandum) 4. If it were otherwise, the exceptions to the public duty doctrine would completely swallow the rule, for even duties of public employees that are owed only to the public at large would be actionable. In this

case, the Ninth Circuit found no evidence that the federal statute on which petitioner relies for the asserted duty of INS officials, 8 U.S.C. 1226(c), "was intended to protect anything other than the public at large," Pet. App. (Memorandum) 4. Because the Ninth Circuit followed the Washington Supreme Court's decision in *Bailey*, petitioner's claim of a conflict with that decision (see Pet. 15-18) is without merit. Neither of the other Washington decisions on which petitioner relies was a decision of the highest court of that State, and each involved a potential class of family members who were victims of domestic violence—a class far smaller than the public at large. See *Yonker* v. *State Dep't of Soc. & Health Serv.*, 930 P.2d 958 (Wash. Ct. App. 1997); *Donaldson* v. *City of Seattle*, 831 P.2d 1098 (Wash. Ct. App. 1992); see also Pet. App. (Memorandum) 5 n.2. Further review of the court of appeals' application of state law therefore is not warranted.

b. Petitioner submits that this Court should nevertheless grant review because, by assertedly misapplying Washington law, the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." Pet. 13 (quoting Sup. Ct. Rule 10(a)). This case, however, is not appropriate for review under this Court's supervisory power. This Court has traditionally exercised its supervisory power to correct errors involving "the proper administration of judicial business." *Nguyen* v. *United States*, 539 U.S. 69, 81 (2003) (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)); see *McCarthy* v. *United States*, 394 U.S. 459, 463-464 (1969) (exercising supervisory power to set aside guilty plea, where district court failed to address defendant personally to determine if he understood the nature of the charge). Petitioners claims are not of that sort. Petitioner has not pointed to a defect in the proce-

dures employed by the court of appeals in considering her case; she has alleged simply that the court of appeals erred in a routine application of principles of Washington state law to the particular facts of this case.

2. There is a more fundamental reason why petitioner is not entitled to relief for the United States' alleged negligence in failing to place a hold on Vasquez or to take him into custody under 8 U.S.C. 1226(c). In *United States* v. *Olson*, No. 04-759 (Mar. 7, 2005), this Court granted certiorari to consider whether the liability of the United States under the FTCA is the same as that of a private individual under like circumstances, or the same as that of state and municipal entities under like circumstances. In this case, the court of appeals, in considering whether the United States could be held liable under the public duty doctrine, appears to have looked only to the principles applicable to municipalities and states and not to have considered the potential liability of a private individual under like circumstances. See *Yonker*, 930 P.2d at 961 (describing the public duty doctrine as applicable only to governmental agencies).

If this Court holds in *Olson* that the FTCA liability of the United States is determined solely by looking to the liability of a private person in like circumstances, then the underlying premise of petitioner's submission—that the liability of the United States should be determined by reference to the state-law public duty doctrine that is applicable to state and municipal officers—is itself fundamentally flawed, without regard to whether the court of appeals properly discerned state law on that issue. Because petitioner raises only questions of state law and proceeds on the premise that the state-law public duty doctrine to government actors does apply, there is no reason for the Court to hold the case pending its decision in *Olson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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